Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-1158

NATIONAL SOCIALIST WHITE PEOPLE'S PARTY & FRED SHERWOOD

Appellants

VS.

SOUTHERN NEW ENGLAND TELEPHONE COMPANY, CONNECTICUT PUBLIC UTILITIES COMMISSION, JOSEPH T. GORMLEY, JOSEPH WALSH, JOHN S. WARD, & FRED NEUSNER

Appellees

JURISDICTIONAL STATEMENT

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I. Opinion Below

The opinion of the three-judge court in the matter of National Socialist White People's Party & Fred Sherwood vs. Southern New England Telephone Company, Connecticut Public Utilities Commission, Joseph T. Gormley, Joseph Walsh, John S. Ward, & Fred Neusner (United States District Court for the District of Connecticut Civil No. 8-74-230) is unreported.

II. Jurisdiction

This action was commenced as a civil action seeking declaratory and temporary and permanent injunctive relief and compensatory and punitive damages under Title 42 U.S.C. §§ 1983, 1985 and 1986. Jurisdiction of the District Court was invoked under Title 28 U.S.C. § 1343 (1) and (3). Judgment denying the plaintiffs relief and dismissing the action dated October 16, 1975 was entered on October 23, 1975. Notice of appeal was filed on December 18, 1975, in the U.S. District Court for the District of Connecticut. Title 28 U.S.C. § 1253 confers jurisdiction over this appeal on the Supreme Court of the United States. Cases supporting the jurisdiction of this Court in this case include Florida Lime & Avocado Growers, Inc. vs. Jacobsen, 362 U.S. 73, 4 L Ed 2d 568, 80 S. Ct. 568 (1960); St. John vs. Wisconsin Employment Relations Board, 340 U.S. 411, 95 L. Ed. 386, 71 S. Ct. 375 (1951). The statute the validity of which is challenged by the plaintiffs is Connecticut General Statutes § 53-37 (C.G.S. § 53-37, C.G.S.A. § 53-37) entitled: "Ridicule On Account Of Race, Creed or Color", appearing in volume 9 of the official General Statutes of Connecticut (1958 Revision) at page . It reads as follows:

> "Any person who, by his advertisement, ridicules or holds up to contempt any person or class of persons, on account of the

creed, religion, color, denomination, nationality or race of such person or class of persons, shall be fined not more than fifty dollars or imprisoned not more than thirty days or both."

III. Question Presented

Whether the District Court committed error in refusing to issue declaratory or injunctive relief protecting plaintiffs from prosecution under a statute which is unconstitutional under the First Amendment.

IV. Statement of the Case

A. Facts: The facts, substantially as recited in the opinion below, are as follows: Plaintiff-Appellant Sherwood, a unit leader of the Plaintiff-Appellant National Socialist White People's Party in Bridgeport, Connecticut, contracted on its behalf for telephone service with Defendant-Appellee Southern New England Telephone Company (SNETCo). The purpose of the phone service was to disseminate certain taped political propaganda messages setting forth the party's views on current events and public issues. The content of these pre-recorded cassette messages was prepared verbatim from White Power, the newsletter published by the George Lincoln Rockwell Party, Inc. These tapes were usually replaced weekly.

The taped statements commented on current events and expanded the political beliefs of the plaintiffs, which include the need for the preservation of the white or "Aryan" race, their belief in the impossibility and undesirability of "Negro equality" and their belief that governments and the communications media have been dominated by "Jewish influence". The business telephone service contracted for was on an auxiliary residence line equipped with automatic announcement equipment. The number was unlisted in the directory, but it was available through the information operator. The number was published in the Party's newspaper, various Party leaflets and "by word of mouth."

Upon receiving a complaint concerning these recordings, the Bridgeport Superintendent of Police, Appellee Walsh, investigated the matter and concluded that the message content violated Conn. Gen. Stat. § 53-37. He did not apply for an arrest warrant, but advised SNETCo by letter that the plaintiffs' telephone was being used in violation of the law and requested that service be discontinued. The Company thereupon advised the plaintiffs in writing of Appellee Walsh's instructions, and explained that as a public utility it was obligated to follow "Southern New England Telephone Company Tariff, Part I, Sheet 4(a), Number 24," which required that phone services furnished by it should not be used for any unlawful purpose. The letter explained that upon receiving such a notification, it was required to terminate service, and it gave the plaintiffs notice that, at the end of 14 days, it would do so. SNETCO did, in fact, terminate the service on June 17, 1974. The present action was filed on July 25, 1974.

B. Prior Proceedings

Plaintiffs commenced this action in three counts, seeking declarative and injunctive relief under the provisions of 28 U.S.C. §§ 1343 (1) and (3) and 42 U.S.C. §§ 1983, 1985 and 1986. The defendants named were the Southern New England Telephone Company (SNETCo), the Connecticut Public Utilities Commission (PUC), the Chief State's Attorney Joseph Gormley, the Bridgeport Superintendent of Police Joseph Walsh, the Chief Prosecutor of the Second Circuit Court of Connecticut John Ward, and Assistant Attorney General Frederick Neusner, the legal adviser of the Defendant PUC. The first count of the Complaint alleged that the plaintiffs were deprived of telephone service without due process by the Defendants SNETCo and Walsh; the second count alleged a conspiracy among Defendants Neusner, Walsh, Gormley and Ward to deprive plaintiffs of rights secured to them under the First and Fourteenth Amendments; and the third count alleged that plaintiffs were threatened with prosecution under C.G.S. § 53-37.

Plaintiffs sought a temporary restraining order preventing the termination of their telephone service and prosecution under C.G.S. § 53-37, a preliminary and permanent injunction to the same effects, damages and a declaratory judgment, by a three judge court convened pursuant to 28 U.S.C. § 2281, that C.G.S. § 53-37 is unconstitutional both substantively and as overbroad and vague. Following an evidentiary hearing on the application for a temporary restraining order held on August 23, 1974, the matter was continued to August 28, 1974, at which time the parties entered into a stipulation that involved the reinstallation of Appellant Sherwood's telephone service. The first and second counts of the complaint were withdrawn, and Appellants proceeded with their challenge to the constitutionality of § 53-37 against the Appellee Walsh only. Appellants' claims for damages were withdrawn, and Appellee Walsh agreed not to instigate the prosecution of plaintiffs during pendency of this action, while reserving the right to do so in the event that the Court should find the statute constitutional and enforceable. A three-judge court was then convened and a hearing had on the constitutional issue on April 18, 1975.

Following a full hearing, the three-judge court denied the plaintiffs declaratory and injunctive relief and entered a judgment dismissing the action, from which judgment the plaintiffs appeal.

V. The Question Is Substantial:

A. APPELLANTS WERE SUBJECT TO SANCTIONS UNDER COLOR OF THE STATUTE.

Although appellants were clearly under threat of prosecution and had already been subjected to extrajudicial sanction under color of the statute,

the District Court refused to declare their messages protected and/or enjoin the threatened prosecution. The Court left appellants totally without relief even though making no finding that their messages were not protected speech. Given the clear finding of extra-judicial enforcement, appellants submit that, at the very least, they were entitled to a declaratory judgment as to whether their speech was protected and whether the statute could constitutionally be applied to prevent and/or criminalize it.

The Court below denied the Appellants relief and dismissed the action stating that the Appellant's use of the telephone to disseminate their views "can not be construed to be the type of advertisement prohibited under § 53-37."

The three instances in which § 53-37 is known to have been invoked during its history each involved a dissemination of unpopular or offensive views, and none involved mere commercial advertising. One of those instances was State of Connecticut vs. Cantwell, 126 Conn. 1, 1939[1] in which members of a religious sect went from door to door disseminating materials offensively hostile to Roman Catholics. A second was a prosecution for the dissemination of hand bills containing allegedly libelous statements which resulted in the unreported memorandum of decision of a trial court of limited jurisdiction relied on by the court below, namely, State of Connecticut vs. Jensen (14th Circuit Court, Hartford, June 9, 1969, Santaniello, J.) The third and latest was this case.

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[1]Rev. sub nom. Cantwell v. Connecticut 310 US 296 (1940). A demurrer to a count alleging a violation of the predecessor statute to § 53-37 was sustained by the trial court. See A 135 Conn. Supreme Court Records and Briefs 271.

Here, the Bridgeport Superintendent of Police, Appellee Walsh, investigated a complaint concerning the Appellants' messages and specifically concluded that the Appellants were in violation of § 53-37. Although he did not seek the arrest of the Appellants, he formally advised Defendant SNETCo that Appellants were using their telephone in violation of law. SNETCo, feeling itself obligated by a tariff filed with the Defendant PUC to the effect that telephone service could not be used for any unlawful purpose, terminated the telephone service of the Appellants, thus depriving them of the means they had selected to disseminate their philosophy. The notice from Appellee Walsh to SNETCo did not initiate any administrative process against Appellants but resulted directly in the termination of telephone service by SNETCo. Appellants were thus obliged by the actions of Walsh and SNETCo, under color of the statute, to take on the burden of going forward, a burden they met by filing this action.

Clearly, the termination of telephone service by a telephone company pursuant to a tariff requiring it to do so when the telephone is used for unlawful purposes, upon the complaint of a high ranking police official charged with the enforcement of the law, is a sanction of law. And that sanction directly and flagrantly made the Appellants' chosen method of exercising their First Amendment rights unavailable to them because of the content of the speech. Termination of a telephone message service may well be more burdensome to an organization bent on disseminating unpopular views than a public prosecution with its attendant publicity for an offense carrying relatively minor penal sanctions.

The decision of the court below leaves the Appellee Walsh free to carry out his unambigious threat of prosecution both for the use they made of the telephone before the last termination of service and for any similar use they may make of it hereafter. A more unequivocable chill to the exercise by the appellants of their First Amendment rights is difficult to conceive.

The subordinate findings of fact made by the District Court plainly contradict its conclusory finding at the actual application of the statute in that since its enactment that the statute had never been applied to noncommercial speech. As that conclusion was the Court's only stated reason for denying injunctive and declaratory relief the case should summarily be reversed and remanded to the District Court to reconsider its denial of relief.

B. THE STATUTE IS VAGUE AND OVERBROAD.

The appellants, having suffered a substantial sanction in the deprivation of telephone service and being subject to the threat of prosecution for violation of a statute never known to have been applied to commercial advertisement but to have been invoked only to curtail the dissemination of expression, assert the patent and impermissible vagueness and overbreadth of the statute as a sufficient basis compelling the issuance of declaratory and injunctive relief. Gooding v. Wilson 405 U.S. 518 (1972).

The rule against vagueness, requiring that a statute "be drawn with sufficient specificity so that persons seeking to exercise First Amendment rights, as well as those attempting to enforce the [statute], will know definitely what is being prohibited," and the rule against overbreadth, requiring that a statute "cover only that conduct which is constitutionally subject to control, and not embrace conduct protected under the First

Amendment or conduct that might be protected but which it is not necessary to control in order to achieve the desired objective" must both be met; otherwise the statute is "void on its face, regardless of the validity of particular applications." Emerson, The System Of Freedom Of Expression, Random House (1970), ppg. 364, 365. See also Klapprott v. New Jersey, 127 NJL395, 22A2d 877 (1941).

The rules against vagueness and overbreadth are not recent and unrefined concepts: In 1947, this Court said: "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment." Winters v. New York, 333 US 507, 509. Nor, in the generation of dynamic constitutional change and development since Winters have these doctrines been abandoned or modified. See Lewis v. New Orleans, 415 US 130 (1974).

Justice Brennan, writing for the Court in Gooding v. Wilson, 405 US 518 (1972) succinctly sets forth the reason and purpose for the rules: "At least when statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution. [citations omitted], the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' [Citations omitted.] This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." Ibid., 520, 521.

It is, of course, true that a statute in form vague and overbroad may be redeemed by "the animating context of well-defined usage" developed from "clarifying construction" by the state courts which provide the requisite narrow specifity to which the Court in Gooding refers. Beauharnais v. Illinois, 343 US 250 (1952). But C.G.S. §53-37 has not been so redeemed, there having never been a reported state court decision definitively interpreting the statute in all the 59 years since its enactment. The very rarity of prosecution under the statute bespeaks a selectivity in enforcement which is an inevitable consequence of vagueness and overbreadth, and the total absence of an authoritative interpretive gloss leaves the statute a blunt club where nothing more than a delicate instrument may be constitutionally permitted.

The constitutional standards are clear; what remains is to demonstrate wherein the vagueness and overbreadth of C.G.S. § 53-37 lie. The statute condems "advertisement" with a proscribed effect. The Court below speculatively concluded that an authoritative interpretation of the statute by the state courts would equate the word with paid, commercial advertisement. But "advertisement" in any common understanding would never be so limited; the courts of Connecticut have never so limited it, with the exception of Jensen, supra; and the statute has never been applied to commercial advertisement. As noted above, it is known to have been applied only three times, including its application to appellants, and in each instance it was applied to noncommercial expression.

Advertisement, in ordinary usage, would seem to extend to a variety of forms of messages to a more or less random public through a variety of devices. The definitions given the words "advertise" and "advertisement" in legal usage are no less ambiguous or expansive. See Black's Law Dictionary, 4th Ed., p. 74. "Ridicule" and "contempt" are likewise words of great elasticity, not less

semantically imprecise than those found wanting in Gooding, supra, ("opprobious words or abusive language"); or in Plummer v. Columbus, 414 US 1 (1973) ("menacing, insulting, slanderous, or profane language") or Lewis v. New Orleans, supra ("wantonly to curse or revile or to use obscene or opprobious language"). One need not cast the net of imagination very widely to capture a number and variety of communications over which the plastic language of § 53-37 could easily be stretched: ethnic humor; criticism of the Catholic Church's position on abortion law reform; remarks addressed to the influence of American Jewry on United States policy in the Near East; observations as to the role of Arab cupidity in the petroleum crisis. Is it not clear at this late hour that the First Amendment through the Fourteenth, protects speech that is in poor taste as well as that which is civil, that is colorful and forceful as well as scholarly and cool and that need not first meet a standard of "truth" or "accuracy" which ideas and value judgments could never meet? It may well be that "the terms necessarily used in group libel laws are seen as excessively vague." Emerson, op. cit., p. 397. "It is highly doubtful whether any words employed to define 'defamation' of a class or race can meet the standards of specificity demanded in the First Amendment area." Ibid. Certainly the words of § 53-37 do not.

The standing of appellants to assert the facial unconstitutionality of § 53-37, facing as they do an unequivocal threat of prosecution and interference with the method they have selected to disseminate their beliefs, is clear. "It can ... withstand [appellants'] attack upon its facial constitutionality only if ... it is not susceptible of application to speech, although vulgar and offensive, that is protected by the First and Fourteenth Amendments..." Gooding v. Wilson, 405 US 518, 520 (1972). Plummer v. Columbus, 414 US 1 (1973). Hess v. Indiana, 414 US 105 (1973). Lewis v. New Orleans, 415 US 130 (1974). This it cannot do and must therefore fall.

C. BEAUHARNAIS V. ILLINOIS SHOULD BE OVERRULED

If the Court does not agree that this case warrants summary reversal or remand for the reasons stated in sections A and B above, there is a substantial question warranting plenary consideration whether Beauharnais v. Illinois 343 US 250, 96 LEd 919 (1952) should be overruled. The history of the Connecticut statute outlined above, is that it has been applied only against non-commercial speech in situations which bear some resemblance to those in Beauharnais. The District Court declined to reach the question whether Beauharnais had been overruled sub silentio, because of its interpretation of the Connecticut statute and that construction erred in ignoring the fact that the statute had been applied in this case.

In Beauharnais, a narrow majority of this Court upheld a conviction under an Illinois statute which, inter alia, prohibited public display of material which "exposes the citizens of any race, color, creed or religion to contempt, derision or obloguy", over a challenge on First Amendment grounds. The Defendant's conviction under this statute was based on his activity organizing the distribution of leaflets, in the form of petitions for assistance from the Chicago City Council, calling for "One million self-respecting white people in Chicago to unite". The leaflet concluded:

> If persuasion and the need to prevent the white race from becoming mongrelized by the negro [sic] will not unite us, then the agressions...rapes, robberies, knives, guns and marijuana of the negro [sic] surely will.

Both the State of Illinois and Defendant Beauharnais treated the statute at trial as involving criminal libel and the majority of the Court, in upholding the conviction, accepted that label though upholding the conviction by application of the clear and present danger test to the history of racial problems in Chicago. Justice Frankfurter writing for the five-man majority concluded:

> In the face of this history and its frequent obligato of extreme racial and religious propaganda, we should deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.

The majority also relied strongly on its conclusion that the statute was not overly broad, and contrasted it with Cantwell v. Connecticut, 310 US 296 (1940) in this respect.

Justice Frankfurter's equation in Beauharnais of "group libel" with individual libel, was criticized by the dissenting Justices, and subsequently by numerous commentators. See e.g. Note: Group Libel Laws, 61 Yale L. J. 252; Pemberton "Can The Law Provide a Remedy For Race Defamation in the United States" 14 New York Law Forum 33 (1968), and Emerson The System of Freedom of Expression, Random House, 1970, pp. 393-397. Frankfurter's per se approach, that libel, no matter who is libelled or in what context, is not entitled to First Amendment protection, has been expressly repudiated by the Court in the line of cases commencing with New York Times v. Sullivan 376 US 254, (1964).

Subsequent history has been kinder to Justice Black's attack on the unanalyzed equation of "group libel" with libel, than with the majority. Thus, the Court has repeatedly reversed convictions based on profanity directed toward policemen, Coates v. Cincinnati , 402 US 611 (1972), Hess v. Indiana, 414 US 105 (1973), Lewis v. New Orleans, 415 US 130 (1974); and the armed forces, Cohen v. California 403 US 15 (1972). And the decisions in the libel area have looked to substance, not form, New York Times v. Sullivan 376 US 254 (1964); Garrison v. Louisiana 379 US 64 (1964); Ashton v.Kentucky 384 US 195 (1966). Justice Frankfurter's decision did not distinguish Cantwell on factual grounds, but instead quoted dicta from the opinion which were almost directly contradicted by the result itself, but the factual distinctions on which the majority must have relied were the directness and immediacy of the threat perceived in the Beauharnais case.

Indeed, Beauharnais has been so narrowly construed and generally disregarded that some courts have thought it overruled. See Tollett v. United States 485 F2d 1087 (CCA8, 1973) holding unconstitutional a federal statute criminalizing mailing of scurrilous and libelous utterances; Anti- Defamation League v. F.C.C.403 F2d 169, 174 n.5. (D.C. CT. App., 1968, J. Skelly Wright, Jr, concurring.) And see Anderson v. Dean 354 F. Supp 639, 642, and Furumoto v. Lyman 362 F. Supp. 1267, 1285. Appellants have found no case decided in the past five years which follows Beauharnais.

Two things are quite certain in looking at the history of group defamation statutes since Beauharnais: 1) they have not been a great

bulwark against racial or religious prejudice,[2] and, 2) their theory has not been upheld when used as prior restraint on speech. See Anti Defamation League v. F.C.C. 403 F2d 169 (DC Cir, 1968) (Burger, J.), Carroll v. Princess Anne 393 US 175 (1969). Indeed, since the overruling of Justice Frankfurter's major premise in New York Times v. Sullivan, no theory supporting supression of racial defamation has emerged.

In short, punishing Plaintiffs' messages as a "libel" exception to the First Amendment relies solely on that portion of Beauharnais which appears to have been overruled.

The reasoning which led the majority to affirm the conviction in Beauharnais is inapposite here in several respects. First, the appellants

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[2]Illinois, indeed, repealed the statute under which Beauharnais was prosecuted. The present form of its successor is worded quite differently, Ill. Annot. Stats. Ch. 38 § 37-1: A person commits criminal defamation when, with intent to defame another, living or dead, he communicates by any means to any person matter which tends to provoke a breach of the peace.

The reason for the change in wording is explained in the Committee Comments to Article 27: [I]t rejects the idea of punishing communications which tend merely to injure reputation and specifically makes the gist of the crime the tendency to provoke breach of the peace. The Committee felt that insofar as the law of criminal libel was designed to compensate for or to mitigate the injury to the victim's reputation, it has completely failed. In addition, the criminal law should not generally be used to remedy private wrongs. A tort action for libel or slander is more appropriate and more effective. Consequently, the theoretical justification for criminal defamation is grounded entirely on the prevention of breaches of the peace.

here could and did incur adverse action under the statute even though they conscientiously avoided means which could reasonably be thought to lead to a breach of the peace. Second, the Connecticut statute is not a libel statute since by its terms it is not susceptible of a defense of truth, a Connecticut Constitutional requirement in all libel actions, (Article First, Section 6 of the Connecticut Constitution of 1965.) Connecticut has shown no desire to turn its courts into forums for quasi-scientific proof of prejudices.[3] Section 53-37 is violated by expressions of ridicule or contempt and it is hard to see how "truth" can be relevant. That Henry Kissinger is, in fact, a Jew, could not be relevant to the question whether appellants' message, correctly so labelling him, violate Sec. 53-37. Third, the state did not demonstrate any connection between either the content or the form of appellants' messages or anything reasonably close to them, and any racial tensions in Bridgeport.

The Appellee Walsh argued below that the statute should be upheld because of its similarity to the statute upheld in the Beauharnais case, and the District Court's uncertainty as to Beauharnais' continued vitality unquestionably played a part in its failure to declare the statute unconstitutional and enjoin its enforcement. Beauharnais has caused similar confusion ever since it was handed down and this case presents an excellent opportunity for the court to clarify its status.

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[3]Several commentators warn against permitting the courts to be used this way. See e.g. Riesman "Democracy and Defamation: Control of Group Libel" 42 Col. L. Rev. 727 (1942) (noting that the Nazi party in Germany was able to use courts as a platform to "prove" the truth of facist positions), Riesman, "Democracy and Defamation Fair Game and Fair Comment" 42 Col. L. Rev. 1085, Note, 61 Yale L. J. 252. Illinois had met this problem by refusing to let Beauharnais prove either truth or good motive. But the Connecticut Constitution makes the jury in a criminal libel prosecution judge of both law and fact, and it has not been construed to except prejudice from this requirement.

VI. CONCLUSION

The District Court erred, given the facts of this case, in construing the statute to be inapplicable, and in failing to find the statute unconstitutional as overbroad and vague. Based on the underlying facts and the statute's prior history the Court committed plain error in failing to declare the appellants' conduct and messages protected and enjoin future prosecutions of them under C.G.S. § 53-37. The facts clearly necessitated declaratory and injunctive relief. The District Court's difficulty was occasioned in substantial part by uncertainty as to the present force of Beauharnais v.Illinois 343 US 250. The court should summarily reverse and remand this case for appropriate declaratory and injunctive relief or should grant plenary review these issues and to determine whether Beauharnais should be overruled or limited to its facts.

Respectfully submitted

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VII. CERTIFICATE OF SERVICE

I certify that on this, the day of February, 1976, I mailed, certified mail, return receipt requested, two copies of Appellants' Jurisdictional Statement to Robert Beach, Esq., Assistant Chief States Attorney, 8 Lunar Drive, Woodbridge, Connecticut 06525; to James Kearns, Esquire, 202 State Street, Bridgeport, Connecticut 06604; to James Curtin, Esquire, 227 Church Street, New Haven, Connecticut 06510; to Joseph G. Lynch, Esquire, Halloran, Sage, Phelon and Hagarty, 25 Lewis Street, Hartford, Connecticut 06103; to Thomas Cotter, Cotter, Cotter and Sohon, 1167 Park Avenue, Bridgeport, Connecticut; to Richard Barger, Esquire, State Office Building, Hartford, Connecticut 06115; and to Daniel Schaefer, Esquire, Assistant Attorney General, 30 Trinity Street, Hartford, Connecticut.

_____
Frank Cochran

Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL SOCIALIST WHITE PEOPLE'S PARTY & FRED SHERWOOD	:	
-vs-	:	Civil No. H74-230
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, CONNECTICUT PUBLIC UTILITIES COMMISSION, JOSEPH T. GORMELY, JOSEPH WALSH, JOHN S. WARD, & FRED NEUSNER	:	

BEFORE: TIMBERS, Circuit Judge, CLARIE and ZAMPANO, District Judges.

MEMORANDUM OF DECISION

PER CURIAM.

This civil rights action was commenced pursuant to 42 U.S.C. §§ 1983, 1985 and 1987; the jurisdiction of the Court was invoked under 28 U.S.C. § 1343(1) and (3). The Court is asked to enjoin the SouthernNew England Telephone Company (SNETCo) from refusing phone service to the plaintiffs, who ask for the convening of a three-judge court to pass upon and declare Conn. Gen. Stat. § 53-37 to be unconstitutional,[1] to enjoin its enforcement and award the plaintiffs damages, costs of court and attorney's fees. The Court finds that the use of the telephone as described cannot be construed to be the type of advertisement prohibited under § 53-37,and accordingly denies relief and dismisses the action.

Facts

The basic facts of the case are not in dispute. The first of three counts in the complaint alleges that at the time in question plaintiff Sherwood, a unit leader of the National Socialist White People's Party in Bridgeport, contracted on its behalf for telephone service with SNETCo. The purpose of the phone service was to disseminate certain taped political propaganda messages setting forth the party's views on current events and public issues. The content of these pre-recorded cassette messages were prepared verbatim from White Power, the newsletter published by the George Lincoln Rockwell Party, Inc. These tapes were usually replaced weekly. The teaching content, which can be described as scurrilous at best, included such subjects as the need for the preservation and advancement of the "Aryan Race"; belief in the impossibility and undesirability of "Negro equality"; and that the communications media is dominated by "Jewish influence."[2] The second count alleges that a conspiracy existed among the defendants for the purpose of depriving the plaintiffs of their constitutional rights, including freedom of the press, freedom of speech and the right to petition for redress of grievance. The plaintiffs claimed that the defendants' action was designed to prevent the plaintiffs from raising constitutional defenses to the termination of their telephone service or to the criminalization of their conduct in a court of law. The third count alleges that the state's proposed enforcement of Conn. Gen. Stat. § 53-37 infringes upon plaintiffs' rights to freedom of speech and of the press, as guaranteed under the first and fourteenth amendments to the United States Constitution.

At the time of the incident complained of, Sherwood had contracted with SNETCo for a business telephone service on an auxiliary residence line equipped with automatic announcement equipment.

The number was unlisted in the directory, but it was available through the information operator. The number was published in the Party's newspaper, various Party leaflets and "by word of mouth."

Upon receiving a complaint concerning these recordings, the Bridgeport Superintendent of Police, Walsh, investigated the matter and concluded that the message content violated Conn. Gen. Stat. § 53-37. He did not apply for an arrest warrant, but advised SNETCo by letter that the plaintiffs' telephone was being used in violation of the law and requested that service be discontinued. The Company thereupon advised the plaintiffs in writing of defendant Walsh's instructions, and explained that as a public utility it was obligated to following "Southern New England Telephone Company Tariff, Part I, Sheet 4(A), Number 24,"[3] which required that phone services furnished by it should not be used for any unlawful purpose. The letter explained that upon receiving such a notification, it was required to terminate service, and it gave the plaintiffs notice that at the end of 14 days, it would do so. Absent any intervening action by the plaintiffs, the Company accordingly terminated the service on June 17, 1974. The present action was filed on July 25, 1974 by counsel acting in the plaintiffs' behalf and retained by the Connecticut Civil Liberties Union.

At the conclusion of the preliminary hearing on August 23, 1974, the matter was continued to August 28, 1974, at which time the parties entered into a stipulation that involved the re-installation of plaintiff Sherwood's telephone service. The first and second counts of the complaint were withdrawn, and plaintiffs agreed to proceed with their challenge to the constitutionality of § 53-37 against the defendant Walsh only. Plaintiffs' claims for damages were withdrawn, and defendant Walsh agreed not to instigate the

prosecution of plaintiffs during pendency of this action, while reserving the right to do so in the event that the Court should find the statute constitutional and enforceable. A three-judge Court was then convened and a hearing had on the constitutional issue on April 18, 1975.

Law

Conn. Gen. Stat. § 53-37 provides:

> "Any person who, by his advertisement, ridicules or holds up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class of persons,shall be fined not more than fifty dollars or imprisoned not more than thirty days or both." (Emphasis added).

The plaintiff Sherwood contends that the statute, both on its face and as applied to him, is an unconstitutional violation of his right to freedom of speech. Any determination of this claim would begin with a consideration of the decision of the United States Supreme Court in Beauharnais v. Illinois, 343 U.S. 250 (1952). In that case a divided court by a 5-4 vote upheld the constitutionality of an Illinois "group libel" statute, similar in many respects to the Connecticut statute being challenged here. As Judge Burger, (now Chief Justice Burger) said in a later case, Anti-Defamation League of B'Nai B'Rith, PAC. S.W.R.O. v. Federal Communications Commission, 403 F.2d 169, 174 fn. 5 (D.C. Cir. 1968), cert. den. March 24, 1969, 89 S.Ct. 1190, it is doubtful Beauharnais now represents the Court's position on the issues raised.

"In Beauharnais v. People of State of Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952), a divided Supreme Court upheld a conviction under a statute outlawing defamation of a racial or religious group. However, far from spawning progeny, Beauharnais has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court."

See also, Garner v. Louisiana, 368 U.S. 157, 202 (1961), where the Court said:

"[W]hen a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' Cantwell v. Connecticut, supra, at 311; Thornhill v. Alabama, 310 U.S. 88, 105. And of course that interest must be a legitimate one. A State may not 'suppress free communication of views, religious or other, under the guise of conserving desirable conditions.'" (Footnote omitted).

In the context of the present case, however, it is unnecessary for the Court to reach the question of the continuing vitality of Beauharnais or its applicability to the situation presented here. It is clear to the Court that § 53-37 was never intended to make criminal the type of

conduct engaged in by the plaintiffs, nor has it ever been applied in such a fashion. Whatever constitutional infirmities the statute may contain, this case is not at present an appropriate vehicle for their delineation.

The questioned statute prohibits the ridiculing or holding up to contempt of a person or class only when such acts are accomplished by means of "advertisement." The plaintiffs' provision of an answering device which could be activated in privacy by the voluntary selection of a caller does not constitute an "advertisement" within the meaning of the statute invoked by the defendant Chief of Police. Although § 53-37 has never been authoritatively construed by the Connecticut Supreme Court, and it appears to have been accorded extremely sparing application since its enactment in 1917, one written decision concerning the statute has been brought to the Court's attention. That decision, State of Connecticut v. Jensen, (14th Cir. Ct. Hartford, June 9, 1969, Santaniello, J.), rests on an interpreation consistent with the one adopted by this Court.

In the Jensen case the Court granted the defendant's motion to quash a criminal information on the ground, that the statutory term "advertisement" could not be construed to encompass the defendant's distribution of handbills purported to contain libelous statements. The Court defined "advertisement" as "a public notice, usually paid for, as of things for sale, needs, etc." [which] "relates to a paid article to bring the public's attention to something for the purpose of promoting the sale of the subject matter in question."

The State Circuit Court (now merged with the Court of Common Pleas) is not an intermediate appellate state court, and its decisions are not

considered to be the final law of the state. However, it does provide the only state court precedent interpreting this statute and its decision is from a court of record.

> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principal or that another is preferable." West v. A.T. & T. Co., 311 U.S. 223, 236-7 (1940).

Also see, Six Companies v. Highway Dist., 311 U.S. 180 (1940); Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940); Cf. King v. Order of Travelers, 333 U.S. 153 (1948).

The listener's deliberate choice of seeking a telephonic political message of this type through a media of private communication was never intended to embrace the term "advertisement," as proscribed in the statute. The Court finds that challenged statute does not apply to the type of conduct engaged in by the plaintiffs.

The plaintiffs' request for an injunction prohibiting the enforcement of § 53-37 against them is denied for the reason that said statute was not intended to reach the type of activity at issue here and would not be so applied by judicial authority in the State of Connecticut.

The foregoing opinion shall constitute the findings of fact and conclusions of law required to be filed by the Court, pursuant to Rule 52(a), Fed. R. Civ. P. SO ORDERED.

Dated at Hartford, Connecticut, this 30th day of September, 1975.

s/ Wm H. Timbers
William H. Timbers
United States Circuit Judge

s/ T. Emmet Clarie
T. Emmet Clarie
Chief United States District Judge

s/Robert C. Zampano
Robert C. Zampano
United States District Judge

FOOTNOTES

[1]Senate Bill 153, Chapter 203, approved April 24, 1917.

[2]Plaintiffs' Exhibits 1, 2, 3, and 4.

[3]This Tariff which has been on file with the Connecticut Public Utilities Commission since 1949 provides:

> "Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used in violation of law or if the Telephone Company receives other evidence that such service is or will be so used."

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL SOCIALIST WHITE PEOPLE'S PARTY & FRED SHERWOOD	:	
V.	:	Civil No. H-74-230
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, CONNECTICUT PUBLIC UTILITIES COMMISSION, JOSEPH T. GORMLEY, JOSEPH WALSH, JOHN S. WARD, & FRED NEUSNER	:	

JUDGMENT

This case came on for hearing before a three-judge District Court, the Honorable William H. Timbers, United States Circuit Judge, and the Honorables T. Emmet Clarie and Robert C. Zampano, United States District Judges, presiding, and this cause having been fully heard and a decision having been rendered dismissing the Complaint and denying the Plaintiffs' request for an injunction prohibiting the enforcement of Connecticut General Statute § 53-37 against them as the said statute does not apply to the type of activity at issue;

It is accordingly hereby ORDERED and ADJUDGED that the Plaintiffs' Request for relief is denied and the action is hereby dismissed.

Dated at Hartford, Connecticut, this
16th day of October, 1975.

SYLVESTER A. MARKOWSKI
Clerk, United States District

By: s/ William D. Templeton
Deputy-In-Charge

APPROVED:

s/ Wm H. Timbers
William H. Timbers
United States Circuit Judge

s/ T. Emmet Clarie
T. Emmet Clarie
Chief Judge, United States District Court

s/ Robert C. Zampano
Robert C. Zampano
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL SOCIALIST WHITE PEOPLE'S PARTY & FRED SHERWOOD	:	
VS.	:	Civil No. H74-230
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, CONNECTICUT PUBLIC UTILITIES COMMISSION, JOSEPH T. GORMLEY, JOSEPH WALSH, JOHN S. WARD, & FRED NEUSNER	:	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

1. Notice is hereby given that NATIONAL SOCIALIST WHITE PEOPLE'S PARTY and FRED SHERWOOD, the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order denying injunctive relief and dismissing the action, entered in this action on the 23rd day of October, 1975.

2. This appeal is taken pursuant to 28 U.S.C., Section 1253.

s/ Frank Cochran
Frank Cochran
Connecticut Civil Liberties
Union Foundation, Inc.
57 Pratt Street
Hartford, CT 06103
Attorney for the Plaintiffs

s/ Donald R. Holtman
Donald R. Holtman
4 North Main Street
West Hartford, CT 06107
Attorney for the Plaintiffs

PROOF OF SERVICE

I, Frank Cochran, one of the attorneys for National Socialist White People's Party and Fred Sherwood, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of December, 1975, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Joseph Walsh, the sole party thereto required to be served, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to his attorneys of record as follows:

TO: James M. Kearns, Esquire, Attorney for Joseph Walsh, 202 State Street, Bridgeport, CT 06604, and

TO: Robert E. Beach, Jr., Esquire, Chief State's Attorney's Office, Drawer H, Amith Station, New Haven, CT 06525

s/ Frank Cochran
Frank Cochran
Connecticut Civil Liberties Union Foundation, Inc.
57 Pratt Street
Hartford, CT 06103
Attorney for the Plaintiffs

Notice of appeal was filed in the United States District Court for the District of Connecticut on December 18, 1975.

Supreme Court, U. S.
FILED
MAR 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1975

No. 75-1158

NATIONAL SOCIALIST WHITE PEOPLE'S PARTY, *et al*,
Appellants

vs.

SOUTHERN NEW ENGLAND TELEPHONE COMPANY, *et al*
Appellees

MOTION TO AFFIRM

Robert E. Beach, Jr.
Assistant State's Attorney
Office of the Chief State's Attorney
Drawer H. Amity Station
New Haven, Connecticut 06525

Counsel for Remaining Appellee

TABLE OF AUTHORITIES

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Time, Inc. v. Hill, 385 U.S. 374 (1967) 1

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Rules

Rule 16, Supreme Court Rules 1

The appellee Walsh moves to affirm pursuant to Rule 16(1)(c) of the Supreme Court Rules. The appellee urges that the question on which the decision of the case depends is so insubstantial as not to need further argument.

The three-judge District Court, whose opinion in this case appears at pages 18-25 in the appendix to the appellants' jurisdictional statement, decided only that the statute in dispute, §53-37 of the Connecticut General Statutes, did not by its terms apply to the activity of the appellants. That court recognized that *Beauhearnais v. Illinois,* 343 U.S. 250 (1952), may no longer represent the views of this Court, but ruled that, because the appellants' activity was not proscribed by the statute, it did not have to reach the issue of the continued validity of *Beauhearnais.*

The sole question presented is whether the District Court erred in denying declaratory and injunctive relief. It should be noted that neither the remaining appellee Walsh nor the State of Connecticut has any intention of attempting to apply the statute to non-commercial speech. In the present posture of the case, then, no concrete dispute exists. *Golden v. Zwickler,* 394 U.S. 103 (1969).

The District Court recognized that the Connecticut courts would interpret the statute to apply only to commercial speech. In so doing, it acted consistently with *Time, Inc. v. Hill,* 385 U.S. 374, 397 (1967) and *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). As in *Hill* and *Broadrick,* the court below recognized that a narrow construction of a possibly ambiguous statute may be necessary in order to obviate consideration of constitutional claims and that Connecticut courts have adequately narrowed the application of the statute.

The appellants rely to a great extent on *Gooding* v. *Wilson,* 405 U.S. 518 (1972). Even *Gooding,* however, recognized that

if a statute were interpreted sufficiently narrowly, federal review would be unnecessary. 405 U.S. at 524-27. Perhaps more importantly, this case presents the converse of *Gooding* in that here the statute has been constructed so that the appellants' conduct falls outside the proscription.

In conclusion, the appellee Walsh respectfully requests that the decision of the three-judge court be summarily affirmed.

Respectfully submitted,
JOSEPH WALSH

By .....
Robert E. Beach, Jr.
Assistant State's Attorney
Office of the Chief State's Attorney
Drawer H. Amity Station
New Haven, Connecticut 06525

CERTIFICATION OF SERVICE

I certify that on this, the 4th day of March, 1976, copies of the motion to affirm were mailed, postage prepaid, to: Frank Cochran, Esq., Connecticut Civil Liberties Union Foundation, Inc., 57 Pratt St., Hartford, Conn. 06103; Donald R. Holtman, Esq., 4 North Main St., West Hartford, Conn. 06107; James Curtin, Esq., 227 Church St., New Haven, Conn. 06510; Joseph Lynch, Esq., 25 Lewis St., Hartford, Conn.; Thomas Cotter, Esq., 1167 Park Avenue, Bridgeport, Conn.; and to Daniel Schaefer, Esq., 30 Trinity St., Hartford, Conn.

.....
Robert E. Beach, Jr., Esquire